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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

YVONNE CUMMINS,

Plaintiff,

v.

CITY OF YUMA, in the COUNTY OF
YUMA, ARIZONA, the CITY COUNCIL,
ITS ADMINISTRATOR, HUMAN
RESOURCES DEPT. and ITS DIRECTOR,
and the MAYOR all in their individual as well
as official capacities,

Defendants.

NO. CV-08-0440-PHX-SRB

**DEFENDANTS' MOTION TO
DISMISS OR IN THE
ALTERNATIVE MOTION FOR
JUDGMENT ON THE
PLEADINGS**

Pursuant to Rule 12(b)(6) and/or Rule 12(c), Federal Rules of Civil Procedure, Defendants City of Yuma, City Council, its Administrator, Human Resources Department, its Director, and Mayor (collectively referred to "City Defendants") move to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted or, in the alternative, on the basis that judgment on the pleadings is warranted, for four reasons: 1) Plaintiff cannot demonstrate a *prima facie* case of age discrimination. 2) Plaintiff improperly named individual employee defendants; 3) Plaintiff failed to serve a

1 Notice of Claim upon the City Defendants for her state law claims and 4) Plaintiff's
2 claims from "several years ago" are barred by the statute of limitations. The following
3 memorandum of points and authorities supports this motion.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. INTRODUCTION**

6 **A. The Charge of Discrimination.**

7 On November 23, 2007, Plaintiff filed a Charge of Discrimination with the
8 Arizona Attorney General's Office, Civil Rights Division alleging that on October 10,
9 2007, the City of Yuma advertised for a job that required applicants to disclose all work
10 experience and a failure to list all work history would be considered untruthful. Plaintiff
11 claimed this advertisement discouraged her from applying for the position and violated
12 her civil rights under the Age Discrimination in Employment Act ("ADEA"). The charge
13 of discrimination was also filed on December 3, 2007 with the United States Equal
14 Employment Opportunity Commission. Plaintiff alleges the "EEOC" issued a notice of
15 right to sue on December 20, 2007. *See* Plaintiff's Complaint, ¶ VIII.

16 **B. The Lawsuit.**

17 Plaintiff filed her lawsuit [75 days later] on March 5, 2008, alleging state
18 and federal claims. *See* Plaintiff's Complaint, ¶ III. Plaintiff alleges that on October 7,
19 2007, City officials placed an advertisement for an accounting position in the local
20 Sunday newspaper. Plaintiff contends that she is "elderly¹," and "well-qualified" for the
21 position. But, Plaintiff alleges she was discouraged from applying for the position,
22 because the City's application process placed an onerous burden upon her to disclose her
23 entire work history. Specifically, Plaintiff contends the City application dissuaded
24 Plaintiff from pursuing the position because it stated that "[y]our application must show
25 all work experience which you possess. Failure to list all work history will be considered
26

27 ¹ Giving Plaintiff the benefit of the doubt, City Defendants presume Plaintiff is
28 over the age of 40.

1 untruthful.” See Plaintiff’s Complaint, p. 2. Plaintiff’s unwillingness to comply with this
2 reasonable request apparently caused her to not apply for the position.

3 Plaintiff failed to allege that she complied with the Notice of Claim
4 requirements for state claims. Plaintiff also alleges unspecified discriminatory acts that
5 occurred “in the past several years” and demands “many years of lost wages”. See
6 Plaintiff’s Complaint, ¶¶ VI & IX. Plaintiff neither alleged that she timely filed a Charge
7 of Discrimination nor her lawsuit within the statutory period.

8 **II. LEGAL ARGUMENTS**

9 **A. Plaintiff Fails to State a Claim Under ADEA or In the Alternative** 10 **Requires Judgment on the Pleadings.**

11 To establish a *prima facie* case of age discrimination, the plaintiff must
12 prove that: 1) he or she is a member of a protected class; 2) **he or she applied for** and was
13 qualified for a promotion; 3) he or she was considered for and **denied the position**
14 [adverse action]; and 4) other employees with similar qualifications who were not
15 members of the protected class were hired. [Emphasis added] See *Nguyen v. City of*
16 *Cleveland*, 229 F.3d 559 (9th Cir. 2000); *Lindahl v. Air France*, 930 F.2d 1434 (9th Cir.
17 1991); *Pejic v. Hughes Helicopter, Inc.*, 840 F.2d 667 (9th Cir. 1988). A simple review of
18 the Complaint reveals that Plaintiff cannot establish a *prima facie* case of age
19 discrimination, because she cannot meet elements no. 2 and 3².

20 Specifically, Plaintiff indicated that she was merely “dissuaded” by the
21 “dozen pages” of twenty years of work experience that would have been required in order
22 to fulfill the job advertisement. See *Plaintiff’s Complaint*, at ¶ V. Plaintiff’s
23 unwillingness to prepare a comprehensive resume does not excuse her obligation to apply,
24 because City Defendants cannot be held liable under the ADEA if they have not taken an
25 adverse action against her. *Id.* Plaintiff elected not to apply, deprived the Defendants of

26 ² If the Court is not inclined to grant City Defendants’ Motion to Dismiss/Motion
27 for Judgment on the Pleadings Defendants reserve the right to argue in more detail
28 Plaintiff’s inability to demonstrate elements no. 2, 3, and 4 in a Motion for Summary
Judgment.

1 an opportunity to consider her for the position, and would have this Court impose liability
2 where no adverse action has been taken. The ADEA simply does not impose liability
3 under these circumstances. *Id.*

4 Accordingly, Plaintiff has failed to state a claim upon relief can be granted.
5 Judgment in favor of Defendants is warranted because on the face of Plaintiff's Complaint
6 she cannot establish a *prima facie* case of age discrimination and therefore, it must be
7 dismissed.

8 **B. Improper Parties – Failure to State a Claim.**

9 Plaintiff improperly sued the City Council, the City Administrator, Human
10 Resources Director and Mayor claiming they violated ADEA in their individual
11 capacities. ADEA does not extend liability to individual employees or employer agents,
12 but rather to the employer, which in this case is the City of Yuma. *See Miller v.*
13 *Maxwell's Intern. Inc.*, 991 F.2d 583 (9th Cir. 1993) (finding civil liability for employment
14 discrimination under ADEA was limited to employers and, thus, did not extend to
15 individual agents of employer who committed violations.) Therefore, Plaintiff has failed
16 to state a claim against the City Council, Administrator, Human Resources Director and
17 Mayor that gives rise to "individual liability." Rule 12(b)(6) FED.R.CIV.P. and
18 ARIZ.R.CIV.P.

19 **C. Plaintiff's State Claims are Time Barred.**

20 1. Plaintiff's State Claims Against the City of Yuma Are Barred by the
21 Notice of Claim Statute.

22 Plaintiff alleges in her Complaint that the City of Yuma's actions violate
23 Arizona law. *See* Plaintiff's Complaint at ¶ III. Plaintiff further filed a charge of
24 discrimination with the Arizona Attorney General's Office, Civil Rights Division. To the
25 extent Plaintiff's Complaint alleges discrimination under Arizona law such claims are
26 barred by the Notice of Claim Statute, A.R.S. §12-821.01³.

27 ³ The purposes of the claim statute requirements are to allow the public entity to
28 investigate and assess liability, to permit the possibility of settlement prior to litigation,
and to assist the public entity in financial planning and budgeting. *See Martineau v.*
Maricopa County, 207 Ariz. 332, 86 P.3d 912 (App. 2004); *City of Tucson v. Fleischman*,

1 A.R.S. § 12-821.01 provides:

2 A. Persons who have claims against a public entity or
 3 public employees shall file claims with the person or persons
 4 authorized to accept service for the public entity or public
 5 employee as set forth in the Arizona Rules of Civil Procedure
 6 within **180 days** after the cause of action accrues.... **Any
 claim which is not filed within 180 days after the cause of
 action accrues is barred and no action may be maintained
 thereon.** A.R.S. § 12-821.01 (emphasis added).

7 In the case at bar, Plaintiff did not allege in her Complaint that she filed a
 8 Notice of Claim upon the City of Yuma, and in fact she failed to do so. Given this failure,
 9 § 12-821.01 mandates dismissal of any allegations pertaining to state law violations
 10 contained Plaintiff's Complaint. *See State Comp. Fund v. Superior Court (EnerGCorp,*
 11 *Inc.),* 190 Ariz. 371, 376, 948 P.2d 499, 504 (App. 1997) (“[N]o action may be
 12 maintained when a plaintiff has failed to file a timely, sufficient notice of claim...”);
 13 *Salerno v. Espinoza,* 210 Ariz. 586, 115 P.3d 626 (App. 2005); *Andress v. City of*
 14 *Chandler,* 198 Ariz. 112, 7 P.3d 121 (App. 2000). Plaintiff alleges that her rights were
 15 violated on October 10, 2007. Plaintiff had 180-days, or until April 6, 2008, to file a
 16 Notice of Claim pertaining to any state law violations. Instead, Plaintiff filed her lawsuit
 17 alleging state law violations without ever filing a Notice of Claim. Her lawsuit is devoid
 18 of any indication that a Notice of Claim was properly served upon the City Defendants.

19 2. The Statute of Limitations Bars Plaintiff's Claims from the “Past
 Several Years.”

20 a. Federal Claims.

21 As a prerequisite to filing suit under the ADEA, Plaintiff was required to
 22 exhaust her administrative remedies and file a charge with the United States Equal
 23 Employment Opportunity Commission (“EEOC”) within 300 days of the alleged unlawful
 24 act. *See* 29 U.S.C. § 626(d)(2). If the EEOC dismisses the charge, the EEOC sends a
 25 letter to the employee notifying him that the EEOC investigation is complete and that the

26 152 Ariz. 269, 272 731 P.2d 634, 637 (App. 1986)(discussing the purposes of the original
 27 notice of claim statute).
 28

1 employee has 90 days in which to bring a civil suit against the employer in federal court.
2 *See* 29 U.S.C. § 626(e). For a lawsuit to be timely, a claim under ADEA must be filed
3 within 90 days of the claimant's receipt of a right-to-sue letter. *See id.*; *see also Baldwin*
4 *County Welcome Center v. Brown*, 466 U.S. 147, 149-50, 104 S.Ct. 1723 (1984). Federal
5 law requires a party to file a lawsuit within 90 days of receiving a Notice of Right to Sue
6 letter from the respective state and/or federal agency. *See id.*; A.R.S. § 41-1481(D); *See*
7 42 U.S.C. § 12117(a); 42 U.S.C. 2000e-5(e)(f). The 90 day deadline to file suit is not
8 simply a procedural requirement, but is considered a statute of limitations. *See Leong v.*
9 *Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003).

10 Here, on the face of Plaintiff's Complaint, it appears Plaintiff did not
11 exhaust administrative remedies and failed to file a charge of discrimination with the
12 EEOC relating to claims from the "past several years." As such, to the extent that she
13 alleges such federal employment claims against the City Defendants, they must be
14 dismissed. Even if Plaintiff adhered to the prerequisite, her claims that discrimination
15 occurred in the "past several years" simply could not possibly survive the 90-day filing
16 requirement and are precluded under federal law.

17 b. State Claims.

18 As a prerequisite to filing suit under the Arizona Civil Rights Act
19 ("ACRA"), Plaintiff was required to exhaust administrative remedies and file a charge
20 with the Arizona Attorney General's Office within 180 days of the alleged unlawful act.
21 *See* A.R.S. § 41-1481 (A). If the charge of discrimination is dismissed, the Attorney
22 General's Office sends a letter to the employee notifying him that the investigation is
23 complete and that the employee has 90 days in which to bring a civil suit against the
24 employer. *See* A.R.S. 41-1481 (D). State law requires a party to file a lawsuit within 90
25 days of receiving a Notice of Right to Sue letter from the respective state agency. *See*
26 A.R.S. § 41-1481(D). The 90 day deadline to file suit is not simply a procedural
27 requirement, but is considered a statute of limitations. *See Madden-Tyler v. Maricopa*
28 *County*, 189 Ariz. 462, 943 P.2d 822 (App. 1997). In no event shall any action be brought

1 pursuant to Arizona law more than one year after the charge to which the action relates
2 has been filed. A.R.S. § 41-1481(D).

3 Simple arithmetic reveals that Plaintiff's alleged claims occurring for the
4 past "several years" are barred by the statute of limitations because it appears Plaintiff
5 failed to exhaust administrative remedies and failed to file a charge of discrimination.
6 Even if one was filed, the claims cannot survive the prerequisite filing deadlines or the
7 one-year statute of limitations.

8 **III. CONCLUSION**

9 The ADEA does not impose individual liability against employees or the
10 agent's of the an employer. Therefore, Plaintiff's claims against City Council, the City
11 Administrator, Human Resources Director and Mayor in their individual capacity must be
12 dismissed.

13 Plaintiff's state law claims must be dismissed because Plaintiff failed to
14 serve a Notice of Claim upon the City Defendants. Further, any state or federal claims
15 from "several years ago" are barred by the statute of limitations.

16 Finally, Plaintiff cannot demonstrate a *prima facie* case of age
17 discrimination, because she did not actually "apply" for the position, which is a
18 requirement to seek protection under the ADEA. For all these reasons, Plaintiff's
19 Complaint must be dismissed, in its entirety, with prejudice or, in the alternative,
20 judgment on the pleadings in favor of City Defendants is warranted.

21 RESPECTFULLY SUBMITTED this 8th day of September 2008.

22 JONES, SKELTON & HOCHULI, P.L.C.

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CERTIFICATE OF SERVICE

☒ I hereby certify that on September 8, 2008, I electronically transmitted the attached document to the Clerk's Office using CM/ECF System for filing.

☒ I hereby certify that on September 8, 2008, I served the attached document by mail on the following, who are not registered participants of the CM/ECF System:

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Plaintiff pro se

s/Letitia L. Wright